Federated Logistics and Operations, A Division of Federated Corporate Services, Inc. *and* Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC (UNITE!). Cases 12–CA–21047, 12–CA–21242 and 12–RC–8539

September 19, 2003

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On March 14, 2002, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief. Both the General Counsel and Union filed an answering brief, to which the Respondent filed a reply brief. The General Counsel filed cross-exceptions[1] and a supporting brief. The Respondent filed an answering brief to the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,[2] and conclusions, to adopt the remedy as modified and to adopt the recommended Order as modified and set forth in full below.

This case arises out of the Union's efforts to organize the employees at the Respondent's warehouse facility in Tampa, Florida, during 2000. As described below, and as more fully discussed in the judge's decision, the Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act during the Union's organizing drive. These violations require the imposition of various remedial measures, including certain extraordinary remedies, and the holding of a second representation election.

The judge found that certain statements to employees by Vice President of Labor and Employee Relations Joe Vella, Vice President of Administration Kevin Hart, and Manager Jody Beachy constituted unlawful threats of futility if the employees selected the Union. We agree.

In mid-September 2000,[3] Manager Beachy told employee Kathy Lee Gay that wages would remain the same during negotiations if the Union won, no matter how long they took, that negotiations would take a long time, and that "we wouldn't get any raises." During employee meetings on October 2 and 4, 4 and 2 days, respectively, before the October 6 election, Vella and Hart stated, with regard to what would happen to employees' wages and benefits if the Union were selected, that "we would start from zero and would negotiate from that," that the Union would strike, and that if a strike occurred the operation could be shut down and moved to another of the Respondent's facilities in 3 days, and that employees could lose their 401(k) plan.

It is well settled that employer statements to employees during an organizing campaign that bargaining will start from "zero" or from "scratch" are "dangerous phrase[s]" which carry within them "the seed of a threat that the employer will become punitively intransigent in the event the union wins the election." *Economy Fire & Casualty Co.*, 264 NLRB 16, 21 (1982), quoting *Coach and Equipment Sales Corp.*, 228 NLRB 440 (1977). Although such statements are not per se unlawful, the Board will examine them, in context, to determine whether they "effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore," or—conversely—whether they indicate that any "reduction in wages or benefits will occur only as a result of the normal give and take of collective bargaining." *Plastronics, Inc.*, 233 NLRB 155, 156 (1977). See also *Capitol EMI Music*, 311 NLRB 997, 1007–1008 (1993), enfd. 23 F.3d 399 (4th Cir. 1994).

Here we agree with the judge that Beachy's, Vella's, and Hart's statements reasonably would be understood by employees as threats that benefits would be lost and that selecting union representation would be futile. *Sivalls, Inc.*, 307 NLRB 986, 1001 (1992). That is, the message imparted to the employees by these statements was that their wages and benefits were endangered, not because of the uncertainties of the collective-bargaining

[1] The General Counsel cross-excepts, arguing that the Order and notice should be modified to conform to the violations found. We agree. We also grant the General Counsel's cross-exception insofar as it seeks to require the Respondent to publish the notice to employees in Spanish as well as English and Haitian Creole. (The Respondent does not oppose this cross-exception.)

[2] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(1) when Human Resources Manager Sallye Davis asked employee Kathy Lee Gay to attend a Union meeting and report back to Davis after the meeting.

[3] All dates hereafter are in 2000.

process, but simply because they selected the Union as their collective-bargaining representative. *General Fabrications Corp.*, 328 NLRB 1114, 1130 (1999), enfd. 222 F.3d 218 (6th Cir. 2000); *Capitol EMI*, supra, 311 NLRB at 1009. Thus, Beachy's comment that wages would stay the same during negotiations lacks context, and pointedly ignores Respondent's historical practice of granting annual merit raises to its employees. Similarly, Vella's and Hart's statements, as well as Beachy's, do not accurately reflect the obligations and possibilities of the bargaining process. Their comments in no way indicate that bargaining was a "give and take" process or that the result would be the product of good-faith bargaining. *Aqua Cool*, 332 NLRB 95, 95–96 (2000). Lacking such context, these statements would reasonably be understood as threats.

It is equally well established that unsupported employer predictions that a strike and then a plant shutdown will follow a union victory are objectionable and unlawfully coercive. *AP Automotive Systems*, 333 NLRB 581, 581 (2001); *Unitec Industries*, 180 NLRB 51, 52–53 (1969); *Franklin Brass Products*, 151 NLRB 800, 803–804 (1965); *Movie Star, Inc.*, 145 NLRB 319, 329–330, 335 (1963), enfd. in relevant part 361 F.2d 346 (5th Cir. 1966). Accordingly, Vella's and Hart's statements to that effect not only contributed to the overall message that support for the Union would be futile, but were objectionable and unlawfully coercive in their own right.

We disagree with our dissenting colleague that employees would reasonably view the comments of Beachy, Hart, and Vella as lawful expressions of the bargaining process in connection with the Respondent's other campaign literature. First, while the Respondent's leaflets that assertedly provided the bargaining context were distributed weeks before the election, Vella's and Hart's superceding statements were uttered on the eve of the election, maximizing their coercive impact. Second, any lawful message in the power-point presentation by Vella and Hart to employees was counteracted by their express statements that bargaining would start from "zero," the Union would strike and the facility might be shut down, and the employees could lose their 401(k).[4] Although, as our dissenting colleague states, the Board must consider the impact of particular employer statements in the context of surrounding circumstances, including the employer's other statements, we must also consider the coercive impact, flagged by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), that a particular employer statement can have even when it is arguably mitigated by other employer statements made at different times or places. An employee might reasonably be influenced more by a coercive statement than by a different noncoercive statement, in order to avoid any adverse consequences.[5]

Lastly, the statements of Beachy, Vella, and Hart "were not made in circumstances free from other unfair labor practices." *Noah's Bay Area Bagels*, 331 NLRB 188, 189 (2000). On the contrary, the Respondent committed numerous other 8(a)(1) and (3) violations, including threats of loss of benefits and the withholding of wage increases, which violations lend additional coercive meaning to these managers' statements. In these circumstances, we agree with the judge that the Respondent violated Section 8(a)(1) by threatening employees that it would be futile for them to select Union representation.

AMENDED REMEDY[6]

The Respondent excepts to the judge's recommendation of extraordinary remedies, consisting of a broad cease and desist order, a public reading of the notice by a Board agent or responsible management official, the furnishing of periodic, updated lists of employee names and addresses to the Union, the holding of a second election offsite, Union access to the facility, and notice and equal time for the Union for captive audience meetings. The Respondent argues that if it committed any unfair labor practices, those violations are not sufficiently serious to justify these remedies. We reject this contention. Contrary to our dissenting colleague, we find that the unfair labor practices found warrant some of the extraordinary remedies the judge recommended, as specified below.

The Board may order extraordinary remedies when the Respondent's unfair labor practices are "so numerous, pervasive, and outrageous" that such remedies are necessary "to dissipate fully the coercive effects of the unfair labor practices found." *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (and cited cases). For example, a public reading of the notice is an "effective but moderate way to let in a warming wind of information, and more important, reassurance." *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539–540 (5th Cir. 1969). In addition, the Board has ordered Respondents to supply updated names and addresses of employees to the Union because that

[4] Our dissenting colleague insists that the Respondent's statements on bargaining communicated an intent only to "start low," not to "slash" wages. As noted above, this view is contrary to Board precedent. In our view, "start from zero" means what it says, and the Respondent's employees could reasonably assume as much.

[5] Of course, an employer may cure the impact of an unlawfully coercive statement by making an explicit, "unambiguous, specific" repudiation of it and assuring employees that no such violation will occur again. *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978). However, no such repudiation and assurance occurred here.

[6] Except as set forth below, we adopt the judge's recommended remedy.

"will enable the Union to contact all employees outside the [workplace] and to present its message in an atmosphere relatively free of restraint and coercion." *Excel Case Ready*, 334 NLRB 4, 5 (2001) (quoting *Blockbuster Pavilion*, 331 NLRB 1274, 1275 (2000)). Further, when a respondent "has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights," the Board has issued a broad order for the Respondent to refrain from misconduct "in any other manner," instead of a narrow order to refrain from misconduct "in any like or related manner." *Hickmott Foods*, 242 NLRB 1357 (1979).

Against this legal background, we find that the following factors justify some of the extraordinary remedies recommended by the judge in this case. First, when faced with the Union organizing effort among its employees, the Respondent responded with extensive and serious unfair labor practices. As more fully described in the judge's decision, the Respondent violated Section 8(a)(1) by maintaining and enforcing an overly broad no-distribution/no-solicitation policy, interrogating employees, creating the impression of surveillance, soliciting employees to conduct surveillance, soliciting employee grievances, promising unspecified benefits, threatening employees that selecting the Union would be futile, threatening the loss of benefits, threatening that wages would be frozen or reduced, and threatening employees that the Union would strike and that the Respondent would react by moving its operation to another facility; and it violated Section 8(a)(3) by withholding a wage increase, suspending employees for engaging in protected activity, and by issuing discriminatory warnings.

Second, some of the Respondent's unlawful conduct pervaded the unit. Managers Vella's and Hart's statements, threatening loss of benefits, implying that it would be futile for employees to select the Union, and predicting a strike and plant shutdown were made at large-group employee meetings. The Respondent's unlawful no-solicitation and no-distribution rules affected all unit employees. In addition, just days before the election, the Respondent wrote the unit employees that there would be no wage increase because of the upcoming election, and wage increases were in fact unlawfully withheld.

Third, some of the Respondent's unfair labor practices tended to have a long-term coercive impact on the unit. Unlawfully withholding pay increases clearly had an ongoing and "immediate and direct impact on unit employees—the diminution of regular, take-home pay." *Dynatron/Bondo Corp.*, 333 NLRB 750, 752 fn. 8 (2001). Similarly, unsupported predictions of a strike and subsequent plant shutdown in the event of a union victory have an abiding coercive impact. *Wallace International de Puerto Rico, Inc.*, 328 NLRB 29 (1999).[7] Such threats serve as an insidious reminder to employees every time they come to work that efforts on their part to improve their working conditions may not only be futile but may result in the complete loss of their livelihoods. Such threats have been found to justify a bargaining order under *Gissel*, a remedy not being imposed in this case. *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 (1996).

Finally, many of these violations were committed by high-level management officials. Accordingly, this conduct had a pervasive and chilling effect on employees' rights.

Under these circumstances, we find that some special remedies are necessary to dissipate, as much as possible, any lingering effects of the Respondent's unfair labor practices, and to ensure that a fair election can be held. Our order will afford the Union "an opportunity to participate in this restoration and reassurance of employee rights by engaging in further organizational efforts, if it so chooses, in an atmosphere free of further restraint and coercion." *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026, 1029 (1979), enfd. in relevant part 633 F.2d 1054 (3d Cir. 1980).[8]

For the foregoing reasons, we find that the Respondent's unfair labor practices (which conduct interfered with the election) warrant a broad cease-and-desist order, requiring the Respondent to cease and desist from committing the specific violations found and from violating the Act "in any other manner." See, e.g., *Audubon Regional Medical Center*, 331 NLRB 374, 379 (2000).[9]

[7] "[T]hreats of plant closure and other types of job loss are more likely than other types of unfair labor practices to affect the election conditions negatively for an extended period of time." Supra at 30, quoting *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), enfd. 47 F.3d 1161 (3d Cir. 1995).

[8] Our dissenting colleague argues that special remedies are inappropriate in this case, in contrast with other cases in which the Board has imposed special remedies. However, the Board has broad discretion to fashion "a just remedy" to fit the circumstances of each case it decides. *Excel Case Ready*, supra at 5, citing *Maramount Corp.*, 317 NLRB 1035, 1037 (1995). See also *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898 (1984). Thus, each case must be evaluated on its own particular facts to determine whether special remedies are necessary to remedy the violations and restore the laboratory conditions necessary for a fair election. The "task of evaluating the likely rate of dissipation of the coercive impact of [the respondent's] conduct, like the task of evaluating its original potency, is one that Congress has entrusted to the Board and its expertise." *Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.2d 400, 408 (3d Cir. 1990), cert. denied 498 U.S. 981 (1990). In our view, for the reasons set forth herein, the special remedies we impose in this case are necessary to effectuate the purposes of the Act and are tailored to ensure a fair election in the particular circumstances of this case.

[9] Our dissenting colleague maintains that a broad order should not be imposed because the Respondent has not been shown to have commit-

Furthermore, we order the Respondent to supply to the Union every 6 months for 2 years, or until a certification after a fair election, the names and addresses of its current unit employees, so that the Union can help to counteract the effects of these violations in its communications with employees.[10] We also order the Respondent to have the attached notice publicly read by a responsible corporate management official or by a Board agent in the presence of a responsible management official, so that employees will fully perceive that the Respondent and its managers are bound by the requirements of the Act. *Blockbuster Pavilion*, supra at 1275–1276. The reading of the notice "will ensure that the important information set forth in the notice is disseminated to all employees, including those who do not consult the Respondent's bulletin boards." *Excel Case Ready*, supra at 5.[11] Because some employees speak Spanish and Haitian Creole as their native languages, we direct that the Respondent have an interpreter also read the notice to employees in Spanish and Haitian Creole, and that the notice be posted in English, Spanish, and Haitian Creole.[12]

ted prior violations of the Act. However, in *Hickmott Foods*, supra, the Board stated that a broad order is appropriate when a respondent has been shown *either* to "have a proclivity to violate the Act *or* has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." 242 NLRB at 1357 [emphasis added]. Thus, in *NLRB v. Blake Construction Co.*, 663 F.2d 272, 285–286 (D.C. Cir. 1981), the court enforced a broad order where the respondent was not shown to have a proclivity to violate the Act. In doing so, the court stated that the "mere fact that the Company has no prior record of NLRB violations does not, in itself, dissipate the egregiousness of the conduct involved in this proceeding." Id. Similarly, we find here that the Respondent's misconduct was sufficiently egregious and widespread to demonstrate a general disregard for the employees' statutory rights. Accordingly, we agree with the judge that a broad order is appropriate.

[10] Our dissenting colleague contends that it is unnecessary to order the Respondent to periodically supply the names and addresses of the employees to the Union because the Union will receive this information in the *Excelsior* list provided before the next election. Contrary to our colleague, we find that receiving only the *Excelsior* list will not sufficiently ensure a free and fair election. The *Excelsior* list is not typically transmitted until after the notice of a new election. In contrast, our remedy is not limited to the time period shortly before the new election because "it is aimed at restoring the conditions that are a necessary prelude to a free and fair election." *Blockbuster Pavilion*, supra at 1275. Because of the Respondent's coercive tactics, the Union "must mount a new organizing campaign among the current employees, who, based on their employer's past conduct, would have reason to fear discussing unionization in the workplace." Id. It is appropriate to provide the Union with the names and addresses of the employees well before a new election is directed so that it can present its message to employees outside the workplace in an atmosphere free from coercion. Given the egregious and widespread nature of the Respondent's conduct, a substantial period of time is warranted for the Union to communicate with employees and attempt to dissipate the effects of the Respondent's unlawful conduct.

[11] Our dissenting colleague states that this requirement is "punitive rather than remedial." However, as we stated in *Blockbuster Pavilion*, supra, 331 NLRB at 1276 fn. 17, where the violations are numerous and serious, "the presence of a responsible management official when a government official informs employees of the terms of [the] remedial order is not demeaning, but only a minimal acknowledgment of the obligations that have been imposed by law." Moreover, we are not requiring that the Respondent's official actually read the notice, but merely be present when the notice is read. "The employees are entitled to at least that much assurance that their organizational rights will be respected in the future." Id.

[12] We do not adopt the judge's recommendation to impose certain additional remedies sought by the Union and the General Counsel. In our view, the Respondent's violations may be remedied without allowing the Union special access and equal time to address employees at the Respondent's facility. With respect to holding the rerun election offsite, it has long been the Board's policy to defer in most cases to the Regional Director's judgment on the issue of election site because "factors which determine where an election may best be held are peculiarly within the Regional Director's knowledge . . . including the many imponderables which are seldom reflected in a record." *Halliburton Services*, 265 NLRB 1154, 1154 (1982); *Herider Farms*, 261 NLRB 762, 771 (1982), enfd. 719 F.2d 402 (5th Cir. 1983); *Manchester Knitted Fashions*, 108 NLRB 1366, 1367 (1954). See also NLRB Casehandling Manual Part Two Representation Proceedings, Sec. 11302.2. Accordingly, we leave the selection of the place of the second election to the Regional Director's discretion.

We also do not adopt the judge's recommendation that Respondent be required to reinstate Sandra Lewis to her former position. As argued by the Respondent and conceded by the General Counsel, at the time of the hearing Lewis had accepted her demotion. We grant Respondent's exception and modify the remedy, Order, and notice accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Federated Logistics and Operations, a Division of Federated Corporate Services, Inc., Tampa, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified and set forth in full below.

1. Cease and desist from

(a) Maintaining an unlawful no-solicitation/distribution rule and disparately enforcing the rule against union supporters.

(b) Interrogating its employees concerning their union membership, activities, and sympathies and those of their fellow employees.

(c) Informing its employees that it would be futile to select the Union as their collective-bargaining representative.

(d) Creating the impression among its employees that their union activities are under surveillance.

(e) Soliciting an employee to attend a union meeting and report back what occurred at the meeting.

(f) Soliciting grievances with the promise to remedy them in order to encourage employees to abandon their support for the Union.

(g) Promising unspecified benefits to employees if the employees abandon their support for the Union.

(h) Threatening employees with the loss of their pension plan, 401(k) plan, and other benefits if they select the Union as their collective-bargaining representative.

(i) Threatening employees that bargaining would start from zero, that the Union would strike, that the work would be moved, and that they would be replaced in the event of a strike.

(j) Threatening employees with a freeze of their wages because they engage in Union activities.

(k) Withholding a wage increase because of the Union campaign and the employees' engagement in Union activities.

(l) Issuing final warnings to, suspending, and demoting its employees because they engage in Union activities.

(m) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful no-solicitation/distribution rule.

(b) Rescind the final warnings issued to Emmanuel Williams and Sandra Lewis.

(c) Make Emmanuel Williams and Sandra Lewis whole for any loss of earnings and benefits they have sustained as a result of the unlawful discipline, with interest.

(d) Within 14 days from the date of this Order, remove from its files any references to the unlawful warning and suspension of Emmanuel Williams and Sandra Lewis, and within 3 days thereafter notify them in writing that this has been done and that the warning and suspension will not be used against them in any way.

(e) Make whole each of the unit employees for any loss of earnings and benefits sustained by them as a result of the unlawful withholding of the wage increase in October 2000, with interest.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Tampa, Florida, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The notice shall be posted in English, Spanish, and Haitian Creole. The notice shall also be read in the presence of all unit employees by a responsible management official or by a Board agent, in the presence of a management official, and shall also be read in Spanish and Haitian Creole by interpreters. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 2000.

(h) Supply the Union, on its request, with the names and addresses of unit employees, updated every 6 months, for a period of 2 years or until a certification after a fair election.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent had taken to comply.

DIRECTION OF SECOND ELECTION

IT IS FURTHER ORDERED that Case 12–RC–8539 is severed and remanded to the Regional Director for Region 12 for the purpose of conducting a second election by secret ballot in the unit found appropriate at such time and place as the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. Those in the military ser-

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

vices may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by the Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC (UNITE!).

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. September 19, 2003

_____

Wilma B. Liebman, Chairman

_____

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

Contrary to my colleagues and the judge, I do not find that the statements made by Managers Vella, Hart, and Beachy constitute unlawful threats of futility under Section 8(a)(1) of the Act. Nor do I agree with the majority that extraordinary remedies are warranted in this case. Rather, I find that traditional remedies will suffice to remedy the unfair labor practices. Accordingly, I dissent from those portions of the Board's decision. In other respects, I join the majority in adopting the judge's rulings, findings, and conclusions.[1]

1. Allegations of Section 8(a)(1)

The majority adopts the judge's finding that Vella and Hart, at their October 2 and 4, 2000 presentations to employees, and Beachy in mid-September 2000, made statements to employees implying that selection of the Union would be futile. Specifically, the judge found that Vella and Hart said, "we would start from zero *and negotiate from that*" regarding wages and benefits (emphasis added). In my view, this statement properly placed wages and benefits within the context of collective bargaining and thus this statement was lawful under the Act. *Taylor-Dunn Manufacturing Co.*, 252 NLRB 799, 800 (1980), enfd. mem. 679 F.2d 900 (9th Cir. 1982). Vella and Hart did not say that wages and benefits would be cut before negotiations and that the Union would have to get them back. Rather, fairly read, they said that the Respondent's bargaining position would start low and that the Respondent would negotiate from there. Of course, this is not unusual in bargaining and is not unlawful. Further, in my view, such statements accurately reflect the obligations and practicalities of the bargaining process. They neither threaten nor imply that the Respondent would slash wages or benefits and bargain in bad faith. *Clark Equipment*, 278 NLRB 298 (1986).

Further, even if Vella and Hart were saying that wages and benefits would ultimately be reduced, they made it clear that such reduction would be the result of bargaining. There is no evidence that they were saying or implying that the reduction would be in retaliation for the employees' having selected the Union as their bargaining representative.

Vella and Hart also said that *if* bargaining failed to achieve an agreement, the Union would strike. Of course, a strike is a union prerogative, and the Respondent was simply making the not unreasonable prediction that a strike would come to pass if the Union failed to achieve its goals in bargaining.

Finally, Vella and Hart said that, *if* there were a strike, the Respondent could move operations elsewhere. The Respondent was not saying that this *would* occur. And, of course, there are situations where a company, faced with a strike, has no choice but to resort to other means to meet production requirements and satisfy customer

[1] However, I find it unnecessary to pass on the judge's findings that the Respondent violated Sec. 8(a)(1) when Manager Susan Hebert allegedly interrogated employee Maverick Valdez and when Manager Sharon Dawson allegedly solicited grievances. These allegations are cumulative of other violations found and would not affect the Amended Remedy, Order, or notice in this proceeding.

needs. The relocation of work to another facility during a strike is one of these other means.

This lawful message was reinforced by the power-point slides that Vella and Hart presented at the meeting where they made the statements. That presentation made it even clearer that terms and conditions were the product of collective bargaining. ("If the union is selected by a majority of voters, the union gets the right to participate in "Give and take" bargaining;" "No one can predict what will happen in bargaining . . . anything is possible.") Additionally, during the election campaign, the Respondent distributed leaflets to employees which expressly stated that "you could get more, the same, or less" through bargaining. There was other campaign literature containing similar language.

The numerous statements of the Respondent that it would bargain in good faith permeated the campaign from beginning to end. This context framed not only Vella and Hart's statements, but those of Beachy as well. Beachy's comments in September 2000 concerned negotiations, and the Respondent had already assured employees in its handouts in August that bargaining is a "give and take" process. The Respondent repeated these statements throughout the campaign. The Board must consider all these circumstances, circumstances that were well known to the employee to whom Beachy spoke. *Mantrose-Haeuser Co.*, 306 NLRB 377, 377 (1992).

My colleagues also argue that quite apart from conveying a sense that bargaining would be futile, the comments were coercive as well. In this regard, they rely upon the "predictions" of a strike and plant shutdown. These contentions are without merit. The majority itself characterizes the statement as "predictions." And, as I discussed above, they were predictions as to what could happen if certain events occurred, i.e., if the Union did not get what it wanted in bargaining.

Based on the context of pronouncements made to the employees throughout the campaign, I find that the statements of Vella, Hart, and Beachy were lawful.

2. Extraordinary remedies

My colleagues conclude that extraordinary remedies are warranted because of the "numerous violations of [Sec.] 8(a)(1) and (3)." Of course, I do not agree with all of the findings of unfair labor practices, and I particularly disagree with those that are found to be important bases for extraordinary remedies. That is, in my view, there were no unlawful threats of strikes and plant shutdown, and there were no unlawful threats to cut wages.

Further, even were I to find all of the violations found by my colleagues, I would still find that traditional remedies suffice to remedy the unfair labor practices in this case. Extraordinary remedies may be appropriate when the unfair labor practices found are "so numerous, pervasive, and outrageous" that traditional remedies will not fully dissipate the effect of the coercive misconduct. *Fieldcrest Cannon*, 318 NLRB 470, 473 (1995).

Precisely because these remedies are "extraordinary" or "special," the Board must demonstrate, as a precondition for granting these remedies, why traditional remedies will not sufficiently ameliorate the effect of the unfair labor practices found. The majority has failed to do this. There is no evidence as to the impact of the unlawful conduct, and no evidence as to whether such conduct would be impervious to traditional Board remedies.

In arguing that extraordinary remedies are warranted here, the majority stresses the fact that the Board has broad discretion in fashioning appropriate remedies. I agree. However, the fact that the Board has discretion in this area means that the Board must explain the exercise of that discretion. In the instant case, the Board must carefully determine whether traditional remedies are so deficient that extraordinary remedies are required. As noted, this is not established here. In this regard, I find that the violations are not as egregious as those in our prior cases awarding extraordinary remedies. Compare *Audubon Regional Medical Center*, 331 NLRB 374 (2000) (remedies granted in light of numerous 8(a)(3) violations, including discriminatory discharges, low evaluations, reassignments, and denial of positions); with *Ishikawa Gasket America*, 337 NLRB No. 29 (2001) (denying notice-reading, even though employer had discharged, suspended, issued warnings, decreased bonuses, conducted surveillance, solicited employees to conduct surveillance, and distributed racially inflammatory literature).[2] Further, although the Respondent discriminatorily disciplined and suspended two employees, it acted quickly to ameliorate the effects of its actions. After briefly suspending two employees, it quickly recalled them with backpay.

Finally, extraordinary remedies here go beyond what is necessary to erase the effect of the Respondent's misconduct. For example, the majority orders the Respondent to supply the names and addresses of employees to the Union for 2 years. However, prior to the next election the Respondent will already be forwarding this information to the Union via the *Excelsior* list. My colleagues argue that this is not enough, because the Union assertedly needs this information to conduct its organizing campaign in an atmosphere free from the effects of

[2] By comparing *Audubon* and *Ishikawa*, I have endeavored to bring some consistency to the Board's treatment of special remedies. I believe that the majority's award here undermines the effort to achieve such consistency.

the Respondent's violations. However, the record does not establish that the Union was unable to communicate with the employees. Further, reading the notice publicly is unnecessary to educate the employees regarding their rights, as the Respondent will already be posting the notice in three languages.[3] Thus, the reading is punitive rather than remedial. Finally, there are no prior violations, and thus this is not a basis for a broad order. *Beverly Health & Rehabilitation Services*, 335 NLRB 635 fn. 30 (2001) (issuing broad order in part because of "history of repeated violations"). In addition, in light of my disagreement with my colleagues as to the extent of the violations here, the conduct in this case does not provide a basis for a broad order.

Accordingly, in these circumstances, I find that extraordinary remedies are unwarranted.

Dated, Washington, D.C. September 19 , 2003

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an unlawful no-solicitation/distribution rule and disparately enforce it against union supporters.

WE WILL NOT interrogate our employees concerning their union membership, activities, and sympathies, and those of their fellow employees.

WE WILL NOT inform our employees that it would be futile to select the Union as their collective-bargaining representative.

WE WILL NOT create the impression among our employees that their union activities are under surveillance.

WE WILL NOT solicit employees to attend a union meeting and report back what occurred at the meeting.

WE WILL NOT solicit grievances with the promise to remedy them in order to encourage employees to abandon their support for the Union.

WE WILL NOT promise unspecified benefits to employees if they abandon their support for the Union.

WE WILL NOT threaten employees with the loss of their pension plan, 401(k) plan and other benefits if they select the Union as their collective-bargaining representative.

WE WILL NOT threaten employees that bargaining would start from zero, that the Union would strike, that the work would be moved and the employees would be replaced in the event of a strike.

WE WILL NOT threaten employees with a freeze of their wages because they engage in Union activities.

WE WILL NOT withhold a wage increase because of the union campaign and the employees' engagement in union activities.

WE WILL NOT issue final warnings to, suspend, or demote our employees because they engage in union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the unlawful no-solicitation/distribution rule.

WE WILL rescind the final warnings issued to Emmanuel Williams and Sandra Lewis and make them whole for any loss of earnings and benefits they have sustained as a result of the unlawful discipline, with interest.

WE WILL within 14 days from the date of this Order, remove from our files any references to the unlawful warning and suspension of Emmanuel Williams and Sandra Lewis, and WE WILL, within 3 days thereafter notify them in writing that this has been done and that the warning and suspension will not be used against them in any way.

WE WILL make whole each of the unit employees for any loss of earnings and benefits sustained by them as a result of the unlawful withholding of the wage increase in October 2000, with interest.

[3] I agree with my colleagues that because some unit employees speak Spanish or Haitian Creole as their first language, the notice should be posted in English, Spanish, and Haitian Creole. The Respondent does not except to the appropriateness of such postings.

WE WILL supply the names and addresses of employees, updated every 6 months, to the Union for 2 years or until a certification after a fair election.

FEDERATED LOGISTICS AND OPERATIONS, A DIVISION OF FEDERATED CORPORATE SERVICES, INC.

Christopher Zerby, Esq., for the General Counsel.
Nathan L. Kaitz, Esq., for the Respondent.
Ira Jay Katz, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This consolidated case was heard before me on September 10, 11, 12, and October 25, 2001, in Tampa, Florida. The consolidated complaint as later amended at the hearing was issued by the Regional Director of Region 12 of the National Labor Relations Board (the Board) on May 31, 2001, and is based on an amended charge filed by the Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC (UNITE!) (the Charging Party or the Union) on November 30, 2000, in Case 12–CA–21047 and a charge filed by the Charging Party on December 15, 2000, in Case 12–CA–21242. On June 5, 2001, the Regional Director issued an Order directing hearing on objections and consolidating cases for hearing and notice of hearing. The objections to the election in Case 12–RC–8539 are based on objections filed by the Charging Party to the results of a secret ballot election conducted on October 6, 2000, among certain employees of Federated Logistics and Operations, a division of Federated Corporate Services, Inc. (the Employer, the Respondent, or the Company) wherein a majority of the employees voted against representation by the Union. The complaint as amended at the hearing alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act. The Respondent has by its timely filed answer to the complaint, as amended at the hearing, denied the commission of any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and exhibits received in evidence and after review of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits and I find that at all times material, Respondent, a Delaware corporation, with an office and place of business located in Tampa, Florida, has been engaged in the business of providing merchandise distribution services to retail department stores located in the State of Florida, that during the past 12 months, Respondent, in conducting its business operations, purchased and received at its Tampa facility goods valued in excess of $50,000 directly from points located outside the State of Florida, and Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits and I find that at all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE UNIT

The appropriate collective-bargaining unit, as set forth in the Stipulated Election Agreement is as follows: *Included*: All full-time, regular part-time, contingent and seasonal advance receiving employees, receiving employees, processing employees, sortation employees, accuracy employees, shuttle employees, transportation employees, delivery employees, visual employees, housekeeping employees, lead employees, and production clerical employees employed by the Employer at its Tampa, Florida facility. *Excluded*: All alteration and fur storage employees, furniture store employees, contract maintenance employees, contract housekeeping employees, contract trucking employees, third-party temporary employees, human resource clerical employees, expense administration clerical employees, professional employees, security employees, guards and supervisors as defined by the Act. Contingent employees who began working on or before June 4, 2000, must have regularly averaged four (4) hours or more work per week during the thirteen week period ending on September 2, 2000, in order to be eligible to vote in the election. Contingent employees who began working after June 4, 2000, must have regularly averaged four (4) hours or more work per week from their first day of work until September 2, 2000, in order to be eligible to vote in the election.

IV. ALLEGED UNFAIR LABOR PRACTICES

A. Background[1]

As set out above the Respondent operates a distribution center in Tampa, Florida, providing merchandise distribution services to retail department stores located in the State of Florida. Respondent provides distribution services for Federated Department Stores at 14 distribution centers in the United States. Respondent performs receipt, distribution, and returns of merchandise for all six retail sales divisions of Federated department stores. Employees at 6 of the 14 distribution centers are represented by labor organizations. The eight nonunion facilities are Cheshire, Connecticut; Kemper Road, Sharonville, Ohio; Cherry Hill, New Jersey; Sacramento and Los Angeles (Mission Road), California; Stone Mountain, Georgia; and Miami and Tampa, Florida.

Mike Korenvaes is the vice president of distribution and is in charge of the Tampa distribution center. Carol Rylander is the operations vice president of logistics at the Tampa facility. Sallye Davis is the human resource manager for the Tampa facility. Calvin Warren is the director of logistics at the Tampa facility. Art Houle was the manager of receiving at the time at issue in this case and reported to Carol Rylander. There were approximately 158 employees in the unit.

In late July of 2000, the Union initiated an organizational drive among Respondent's employees and held a number of

[1] All dates are in the year 2000, unless otherwise stated.

meetings. The Respondent began to hear rumors of union activities among its employees in early August. The Union was in the process of soliciting authorization cards from unit employees. Union supporters were engaged in asking employees for their names and addresses in order for the Union to contact them at their homes. On August 25 the Union filed a petition in Case 12–RC–8539. On August 28 Respondent's vice president of labor and employee relations, Joe Vella, was informed of the union campaign and arrived in Tampa on August 29. Vella's office was at the Company's headquarters in Cincinnati, Ohio.

During the course of this process Sandra Lewis and Emanuel Williams, two of the leading union supporters, were identified by Respondent as soliciting on behalf of the Union and were interrogated about this by the manager of human resources, Sallye Davis, and warned that their engagement in solicitation and distribution on behalf of the Union was in violation of Respondent's rule prohibiting solicitation and distribution to employees during work time and could result in disciplinary action. During this period up to the election which was set for October 6, 2000, the Respondent brought in several management representatives from other locations to the Tampa location to aid in combating the union campaign. Included among them were Managers Manny Perez, Exant Remy, Sharon Dawson, Jody Beachy, and vice president of administration, Kevin Hart.

When Vella arrived at the Tampa facility on August 29 he distributed a document entitled "Communications Guidelines for Managers" to the managers who were at the facility on that date and held a lengthy meeting with them. He testified that a makeup meeting was held a day or two later by other members of his staff for managers who were not present on August 29. He did not know who conducted the makeup meetings. Nor was evidence adduced by Respondent to demonstrate that all of the managers recruited to assist in the campaign and all of the managers regularly assigned to the Tampa facility had received the training. Additionally, Vella along with vice president of administration, Kevin Hart, and vice president of distribution, Mike Korenvaes, who is in charge of the Tampa facility, met with the employees, on October 2 to October 4. Vella made "PowerPoint" presentations about unions to groups of employees from which he initially testified he read verbatim but later acknowledged that he may have added a word or two. Questions from the employees at the meetings were answered after the PowerPoint presentation. Additionally, Vella testified he directed the managers to introduce and/or engage the employees at their workstations and ask them if they had any questions. On October 6, 2000, the election was held and the Union lost by a vote of 81 against and 60 for the Union. The Union filed timely objections to the Election on October 13, 2000.

It is alleged that the no-solicitation rule is violative of the Act and that the various management representatives of Respondent committed several violations of the Act by interrogating the employees concerning their union membership, activities, and sympathies and those of their fellow employees, threatening loss of benefits and pay, telling employees their support of the Union was futile, engaging in surveillance of the union activities of the unit employees and creating the impression of surveillance, refusing to grant a wage increase and attributing the failure to grant a wage increase to the Union, among others. It is also alleged that Respondent violated Section 8(a)(3) and (1) of the Act by its issuance of a final warning to its employees Emanuel Williams and Sandra Lewis and by its demotion of Sandra Lewis.

B. The Allegations

1. The no-solicitation rule

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by maintaining an unlawful no-solicitation/distribution rule in its employee handbook. The rule is as follows:

> Solicitation of or distribution to associates by other associates is permitted on company property provided:
>
> 1. The associate doing the Solicitation/Distribution is not on working time, and,
> 2. The associate receiving the Solicitation/Distribution is also not on working time, and,
> 3. The Solicitation/Distribution is not attempted in the facility in a work area and is not disruptive to another associate who is on working time.
>
> 'Working time' does not include time before or after scheduled work hours, lunch periods or during paid rest periods.
>
> The rule applies to all of the Company's locations and to solicitations/distributions for all purposes, including lotteries and raffles, political, labor or fraternal organizations, and the like. The only exceptions to this policy are the annual United Way Campaign and other community benefit projects which are specifically authorized by the Company, and approved vendor or Company events. Violation of this rule will subject an associate to disciplinary action, up to and including termination.

General Counsel in his brief contends that "employees have a statutory right to engage in solicitation for a union in both work and non-work areas during their non-working time, absent special circumstances" citing *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962), and that while "non-discriminatory rules may prohibit employees from engaging in distribution at all times in work areas, *they may not prohibit solicitations in work areas on non work time.* Id. *Eagle-Picher Industries*, 331 NLRB 169 (2000) (emphasis added). General Counsel notes that Paragraph 3 of the rule states in part "The *Solicitation*/Distribution is not attempted in the facility in a *work area*." (emphasis added). Respondent has cited no Board case which has held that the prohibition of *solicitation* in work areas on nonwork time is lawful.

I find that Respondent violated Section 8(a)(1) of the Act by maintaining the no-solicitation rule in its employee handbook, which prohibits solicitation in *work areas* during nonworking time.

2. Alleged interrogation of employees concerning their union activities engaged in by Sallye Davis and her creation of the impression that the employees' union activities were under surveillance

In early August, lead employee Sandra Lewis asked Mike Perino, a manager for Keystone Freight, which provides shipping services for Respondent, about unions and unionization. Perino reported this to Vice President Mike Korenvaes who informed Human Resources Manager Sallye Davis who then called Lewis into her office and interrogated her about this. Davis' notes of this meeting on August 11 shows that Lewis denied having asked Perino about unions and that Davis then "challenged" Lewis' denial and asked Lewis why she "would go to Mike with a question of this nature rather than me." Lewis then admitted discussing unions with Perino and told Davis that a petition was being circulated and offered to tell Davis if she heard anything additional about the subject. In her note of August 14, Davis wrote, "get with Sandra. Points finger at you totally involved" and again warned Lewis of Respondent's no-solicitation policy. Lewis testified that after her discussion with Perino, Respondent no longer permitted drivers of Keystone Freight who were unionized to enter the warehouse.

The record further shows as testified to by employee Emanuel Williams and corroborated in Davis' notes of August 17, that Davis called Williams into her office on that date and interrogated him concerning his solicitation of employees on behalf of the Union and issued him a verbal warning against soliciting and threatened him with termination if he continued to solicit employees on behalf of the Union. Davis wrote in her memo that she told Williams he had been identified by someone as approaching other employees and "asking them for their address and phone number for what has been reported as a petition."

The record contains unrebutted testimony by several employees and one supervisor that employees sold items at work and solicited other employees. Manager Trish Ellington admitted she did not enforce the no-solicitation rule. Employee Laura Watman testified that Human Resources Manager Sallye Davis personally bought and received shrimp while at work. It appears that the only enforcement of the no-solicitation rule was directed against employees who were believed to have solicited on behalf of the Union.

I find that interrogation of Lewis and Williams by Davis was coercive and tended to restrain and interfere with their rights to engage in union activities under Section 7 of the Act. *SAIA Motor Freight, Inc.*, 334 NLRB 979 (2001); *Kellwood Co.*, 299 NLRB 1026 (1990), enfd. 948 F.2d 1297 (11th Cir. 1991). Lewis and Williams were summoned to Davis' office, interrogated in a hostile manner concerning their engagement in soliciting on behalf of the Union and Williams was issued a verbal warning for soliciting and threatened with termination if he engaged in any further solicitation on behalf of the Union. I find the interrogation of Lewis and Williams by Davis was inherently coercive and Respondent thereby violated Section 8(a)(1) of the Act.

I further find that Respondent violated Section 8(a)(1) of the Act by creating the impression of surveillance that their union activities were under surveillance. The questioning of Lewis and Williams took place in Davis' office in a formal hostile environment. They were not apprised of how Davis had become aware of their union activities. Davis' "challenged" Lewis concerning her union activities and did not respond to Williams' request that he be faced with his accusers. Davis' conduct created the impression of surveillance. *Grouse Mountain Lodge*, 333 NLRB 1322 (2001), citing *Tres Estrellas de Oro*, 329 NLRB 50 (1999).

3. The request by Sallye Davis of employee Kathy Lee Gay to attend a union meeting and report back to Davis what occurred at the meeting

Employee Kathy Lee Gay testified that she was called into Davis' office and told by Davis that she had heard a Union was attempting to get into the facility. This occurred on September 1. Davis asked Gay to attend an expected upcoming union meeting on that day and listen to what was said at the meeting and report back to Davis. Gay agreed and went to a nearby park where the meeting was to be held, but there was no meeting. Gay's testimony is unrebutted as Davis did not deny that she had done this. Respondent violated Section 8(a)(1) of the Act by asking Gay to spy on the union meeting and report back to Davis and created the impression of surveillance thereby. *State Equipment Inc.*, 322 NLRB 631 (1996).

4. Solicitation of grievances engaged in by Respondent's manager, Manny Perez

Manny Perez was one of several managers brought by Respondent from other facilities to aid Respondent in its election campaign against the Union. Employee Mike Mitchell testified that in the last week of August, Manny Perez approached him at work and introduced himself. Perez told Mitchell that the Tampa employees had Cincinnati's attention. Cincinnati is the location of Respondent's corporate headquarters. Mitchell testified that Perez asked him what the problems were in Tampa and that Perez took notes of his complaints and said he would get back to him. Perez denied having this conversation with Mitchell and testified that the only conversation he had with Mitchell related to the pay rate for receivers in Los Angeles where Perez worked. According to Perez he was introduced to Mitchell along with two other managers, Sherry Dawson and Angie Munoz who were introduced to the employees on September 12. Mitchell asked him how much a loader receiver made in Los Angeles. Perez told Mitchell $7.25 and Mitchell called him a f—g liar. Perez denied having any further contact with Mitchell and testified that he kept away from Mitchell after this incident. Munoz was not called as a witness and Dawson who was called as a witness by Respondent was not questioned concerning any statements made by either Mitchell or Perez at the time of their introduction. Nor was Mitchell recalled to rebut the testimony of Perez.

After a review of this testimony I conclude that Perez is correct that the date of this incident was September 12. I also credit Mitchell that Perez asked the employees what the problems were in Tampa and took notes after telling them that they had Cincinnati's attention. I also credit the testimony of Perez that Mitchell asked him about the pay rate and that Mitchell responded in the manner testified to by Perez after Perez answered his question. I find that the foregoing testimony of

Mitchell supports a finding that Perez made the statements attributed to him by Mitchell and was soliciting grievances with the implied promise to remedy them in order to defeat the Union's campaign. I note that Respondent's witnesses Perez and Dawson testified that they asked the employees if they had any questions. Implicit in this question is the likelihood that this question was asked to solicit grievances, and problems from the employees. I also reply on the testimony of Mitchell that Perez took notes of what his complaints were. The obvious purpose of this was to signal to employees that their grievances would be dealt with in a favorable way by management, thus, negating the need for a union. I thus find that Respondent violated Section 8(a)(1) of the Act by Perez' solicitation of grievances with the implied promise to remedy them if the parties abandoned their support of the Union. *Laboratory Corp. of America Holdings*, 333 NLRB 284 (2001), citing *Maple Grove Health Care Center*, 330 NLRB 775 (2000).

5. Promise of unspecified benefits

Employee Mildred Pepennella testified that around August 25 or 26, her manager, Art Houle, initiated a conversation with her at her workstation and brought up the subject of the Union. Houle acknowledged that Respondent had a number of problems but told her things would get better if she would hang in there. He told her the Respondent would make a lot of changes. Thereafter Houle said, on any occasion that he went by her desk that they do not need a union and that the Company would take care of everything if the employees just let them. Houle denied having made these statements to Peppenella and testified he only had one conversation about the Union with Peppenella.

I credit the testimony of Peppenella, which I found to be consistent and reliable. I find Houle was making daily visits to Peppenella at her workplace which was consistent with the directions of Human Resources Vice President Vella to managers that they talk to employees at their workstations about the Union and with directives to managers that they present the employees individually with various antiunion flyers as they were issued and explain them individually to the employees. Moreover, Houle acknowledged that he spoke to Peppenella on a daily basis. I find that Houle did promise Peppenella unspecified benefits (that Respondent would take care of problems) if the employees abandoned the Union and that Respondent thereby violated Section 8(a)(1) of the Act. *Grouse Mountain Lodge*, supra.

6. Solicitation of grievances with the promise to redress them

Peppenella testified that in early September, she entered the restroom and observed Sharon Dawson, a manager from Respondent's Tukwilla, Washington facility, and another manager talking to a Tampa employee. Peppenella testified she told Dawson the heat was unbearable, the air-conditioning was either broken or turned off, there were no paper towels or toilet paper and that no one did anything about it. Peppenella told her there were problems with management. Peppenella then exited the restroom and Dawson came over to talk to her. Dawson said she understood what some of the problems were. Peppenella told her there were nine different managers telling employees nine different things to do. She also mentioned problems with overtime and scheduling. Dawson responded by saying, "give the Company a chance. We're going to make changes."

Employee Rebecca Harvey testified that she spoke with Dawson either the last week of September or the first week of October. Harvey told Dawson of several problems. Dawson told her she knew there were problems that should be solved and she would bring them to management's attention.

Manager Dawson testified she had three conversations with Harvey and that the first conversation occurred on September 12, which was the first day she was at the Tampa facility. I credit Dawson's placement of the date of the conversation. Dawson testified she introduced herself as being from the Tukwilla facility and asked Harvey if she had any questions. Harvey responded that there were problems at the Tampa facility such as the heat in the trailers and that she was a clerical and should not be required to unload trailers. She testified the conversation ended when another employee approached and that she (Dawson) turned to that employee and asked if that employee had any questions. She denied making any promises to Harvey or telling her she would pass on her concerns to management.

Dawson testified that a day or two later she had a second conversation with Harvey. She asked Harvey if she had any questions regarding the union environment. Harvey responded that Dawson might as well not bother to talk to her, as she would not believe Dawson. That ended the conversation. Dawson testified she had a third conversation with Harvey on October 10 to say goodbye to her and that Harvey said nothing would change and that she responded she knew there were issues here and she hoped everything turned out okay. She denied having made any promises to Harvey in that conversation.

Dawson testified she had only one conversation with Peppenella. This took place in the second week she was at the facility. She approached Peppenella and asked if she had any questions she could answer as she was from a union shop facility in Tukwilla. Peppenella complained about the heat and the manner in which the Company had handled a medical problem. She agreed with Peppenella that it was hot in the building but did not otherwise respond to the complaints. She ended the conversation by saying if you have any questions, feel free to contact me. She denied having made any promises to Peppenella in this conversation, and testified she did not tell her the Company was going to make changes or ask her to give the Company a chance.

I find that Respondent by Sharon Dawson violated Section 8(a)(1) of the Act by soliciting grievances from both Mildred Peppenella and Rebecca Harvey. My review of the above-cited testimony convinces me that Dawson was soliciting grievances from Peppenella and Harvey and impliedly promising that they would be remedied if Respondent were given another chance by reason of the employees' abandonment of the Union. I credit the specific versions of these conversations given by Peppenella and Harvey over the version given by Dawson to the effect that she only asked whether Harvey and Peppenella had questions. It is apparent that Dawson's focus in her ques-

tioning of these employees was to draw out perceived problems and offer assurances that the problems would be addressed.

7. Interrogation and threats of futility of the employees' support of the Union

Employee Kathy Lee Gay testified that in mid-September, she had a conversation with Jody Beachy, a manager at the Stone Mountain facility who had been recruited by management to assist the Company in its antiunion campaign at the Tampa facility. Beachy had worked at the Tampa facility prior to his promotion to another position at the Stone Mountain, Georgia facility and Gay and Beachy knew each other. After Beachy had been in the building for a few days Gay asked him when he was going to come to see her. Beachy came to her office the next day. He told her that if the Union was selected, the employees could end up paying assessment fees to the Union and that the Union and Company would be negotiating a contract which could take a longtime. In the meantime there would be no raises. He also told her that another company had been in arbitration for 3 to 5 years. He also told her that if the Union won the election, the employees would probably lose their 401(k) savings plan. He also asked her if she was a yes or no vote for the Union. She told him she was not going to answer that because it was her decision. This ended the conversation.

Beachy testified they talked about the union activity as Gay had questions about the Union and he was answering as many questions as he could for her. There was a conversation about increases. He had multiple conversations with her. There was a rumor that there would be a dollar (per hour) increase and she talked about it. He told her everything had to go to the bargaining table and be negotiated. He denied having said anything about what happens when everything goes to the bargaining table. He does not recall talking to her about the 401(k) plan. He denied talking to Gay about the length of time of bargaining or her wages during the bargaining period. He admitted telling her that wages would stay the same no matter how long the bargaining took. He did not discuss what would happen with respect to merit increases during the bargaining period. He denied telling her she would probably lose her 401(k) plan if the Union came in. He denied asking Gay how she would vote.

I credit Gay's specific testimony. I find that Beachy admittedly told Gay wages would remain the same during negotiations and admittedly did not tell her that Respondent could or would continue its practice of granting annual merit wage increases. I find that Beachy's message to Gay was that the selection of the Union would be a futile act as the employees would receive no wage increases until the parties negotiated a contract which could take a longtime and thus violated Section 8(a)(1) of the Act. *Grouse Mountain Lodge*, supra. I also find that Beachy's interrogation of Gay as to whether she was a yes or a no vote was violative of Section 8(a)(1) of the Act. *SAIA Motor Freight, Inc.*, supra.

8. Alleged threats to employees of loss of 401(k) and other benefits and the futility of selecting the Union as their collective-bargaining representative

There was a large group meeting held by Respondent's management on October 2. Vice President Mike Korenvaes introduced vice president of labor and employee relations, Joe Vella, and vice president of administration, Kevin Hart. Vella made a lengthy "PowerPoint" slide presentation during the meeting and Hart spoke about the Respondent's experience with a union at the Company's Secaucus, New York facility where he is located. Hart and Vella both testified that they read what was contained on the slide. Vella, later in his testimony, conceded that he added a word or two to the presentation. However employees Mike Mitchell, David Shannon, and Mildred Peppenella testified that neither Vella nor Hart stuck strictly to reading what was on the slide. The management opened the meeting for questions by the employees after the slide presentation.

Mitchell testified that both Vella and Hart "ad-libbed or added to what was on the slides." He also testified that Hart said "we would start from zero and would negotiate from that," and that any existing benefits could be jeopardized. He also testified that management stated they could shut the building down in 3 days and move the operation elsewhere if negotiations were unsuccessful (which was a reference to the Company's Hurricane Contingency Plan explained at the hearing by Vice President Korenvaes).

Employee David Shannon testified concerning the meeting that Hart stated that if the employees chose union representation, they would start from ground zero and could lose their benefits and their 401(k) plan.

Mildred Peppenella testified that after the showing of slides at the October 2 meeting, the meeting was opened up for questions. Management representatives told the employees they could start off with zero wages. She asked how they could start off with zero when they were already making $5 per hour in Secaucus, New Jersey. She was told the Union could do it. Peppenella testified that management representatives Vella and Hart told the employees that the Union wanted control of the 401(k) plan. She also testified that Hart discussed the Company's hurricane plan whereby it could ship all of the merchandise to Stone Mountain, Georgia, in 3 days if a hurricane occurred and that similarly they could ship the merchandise elsewhere if a strike were to occur.

Vella denied having stated that negotiations would start at zero. He also testified that the hurricane plan was explained to answer an employee statement. Hart also denied that employees were told that negotiations would start at zero or that the work could be moved in 3 days. Respondent's PowerPoint presentation delivered by Vella contains a reference to the Secaucus, New Jersey UNITE contract and notes that the employees at Secaucus do not have a Company pension plan or a 401(k) plan but employees "only get union controlled pension plan." Under the heading of "Strikes" it states "Union will try to stop work here" and "Company can protect itself by hiring new people or moving work." Under "Strike Participants" it also states "Company can hire replacements for strikers" but does not otherwise address the rights of strikers to an immediate return on an unconditional offer to return by strikers in the event of an unfair labor practice strike or the right to be placed on a preferential hire list in the event of an economic strike.

I credit the testimony of employees Mitchell, Shannon, and Peppenella which I found to be mutually corroborative and bolstered by a review of the PowerPoint presentation made by

Vella which contains terse statements which need explanation in order to be meaningful to the employees. I credit the employees' testimony that Vella did not follow the PowerPoint presentation verbatim. I further note as conceded by Vella and Hart they spoke in response to questions from the employees after the presentation by Vella. I find that Vella and Hart did inform the employees that bargaining would start at zero and that the Union would seek to take control of their 401(k) plan and that it was likely they would lose the 401(k) as the Union would bargain for control as it did at Respondent's facility in Secaucus, New Jersey. I further credit the testimony of Mitchell and Peppenella that Vella and Hart told the employees that the work could be moved in the event of a strike.

I accordingly find that Respondent violated Section 8(a)(1) of the Act by its threats that bargaining would start from zero, that the Union would strike, that the work would be moved and the employees replaced, and that they could lose their 401(k) and pension plans. All of this in combination was a threat to employees that it was futile to support the Union. The threat of bargaining from scratch violated Section 8(a)(1) of the Act. *Noah's New York Bagels, Inc.*, 324 NLRB 266 (1997), citing *Taylor-Dunn Mfg. Co.*, 252 NLRB 799 (1980). A threat of loss of benefits and futility if the employees selected the Union violated Section 8(a)(1) of he Act. *Noah's Bay Area Bagels, LLC*, 331 NLRB 188 (2000), citing *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977).

9. Alleged interrogation of employee Kathy Lee Gay by operations vice president of logistics, Carol Rylander

Employee Kathy Lee Gay testified that around the 23rd of September, Operations Vice President Carol Rylander came to her work area and commenced discussing Gay's upcoming vacation. Rylander said she knew Gay was a no vote. She asked if Gay would return in time for the vote and urged her to do so. Rylander attempted to talk her into returning early from her vacation to vote. Gay told her she did not think she would be able to do so. The next day Gay was called into the office of her manager Calvin Warren and told to close the door. Warren then asked her if she was sure there was no way she would be back for the vote. He then told her the Company would fly her in for the vote and then fly her back to New Orleans where she was to be on vacation. She told him she did not think so but would have to check with her husband which she did later that day. Her husband did not agree and she reported this to Warren that day. Rylander corroborated Gay's testimony but denied having told Gay she knew Gay was a no vote. I credit Gay's specific testimony and find that Rylander did tell Gay she knew she was a no vote.

I find that Rylander's statement to Gay that she knew Gay was a no vote was unlawful interrogation designed to elicit from Gay information as to whether she supported the Union and tended to restrain, coerce and interfere with Gay's rights under Section 7 of the Act and was violative of Section 8(a)(1) of the Act. *SAIA Motor Freight, Inc.*, 334 NLRB 979 (2001).

10. Alleged creation of impression of surveillance

Employees Mike Mitchell, David Shannon, and Maverick Valdez all testified that on October 6, the day of the election, they observed Manager Warren in their work areas and that Warren appeared to be watching employees many of whom were wearing red UNITE shirts in support of the Union. Mitchell testified that Warren walked the entire dock area and stopped at each of the 19 doors. He observed Warren writing on a notepad at doors where the employees were wearing the red UNITE shirts. Warren did not write on the notepad when he walked past doors at which employees were not wearing the red UNITE shirts. Shannon testified that at about 9:30 a.m. (which was the time the voting began) Warren observed employees as they walked past. Shannon testified that as employees wearing red UNITE shirts walked by, he nodded his head and appeared to be counting. Valdez observed Warren just past 6 a.m. in a work area carrying a small pad and a pen. He observed Warren look at employees wearing UNITE shirts and writing on the pad. Valdez also testified that later that morning Warren asked him where his union shirt was. Mildred Peppenella testified she observed Warren standing behind a stack of boxes looking in the direction of the dock doors and writing on a little pad.

Warren acknowledged that he was in the various work areas on the day of the election and that he wrote on his pad. However he testified he was checking which doors needed trailers and was noting how many jams and which lanes were having problems. He denied writing down the names of the employees who were wearing union shirts. He acknowledged that he observed the employees wearing the union shirts and admits he was mentally counting the employees who were wearing union shirts. He denied asking Valdez where his union shirt was that day. Mitchell, Valdez and Peppenella all testified that Warren's presence in the receiving area on that day was out of the ordinary. I credit the unrebutted testimony of employees Mitchell, Shannon, Valdez, and Peppenella. I find that Warren's presence in the receiving area and his activities on that day were related to the election and that Respondent created the impression of surveillance which tended to have a coercive and restraining effect on the employees and that Respondent thereby violated Section 8(a)(1) of the Act. *Grouse Mountain Lodge*, 333 NLRB 1322 (2001).

11. Alleged solicitation of grievances with the implied promise to remedy them by Vice President Mike Korenvaes

Employee Sylistor Williams testified that during the last week or two of September, vice president of operations ,Mike Korenvaes, approached him and asked whether the employees were having any problems. Korenvaes said he wished the employees had come to him instead of going to the Union. He remarked he felt like they were family. He also said if the company could get a second chance, they would try to make things right. Williams testified he did not respond to the inquiry as to whether the employees were having problems.

Mike Korenvaes testified that he recalled a specific conversation he had with Sylister Williams during the union campaign. He asked Williams, "What do you think about what's gong on?" Williams replied, "it's just stuff going on. People are talking." Korenvaes then said, "Well I hope you feel that I'm someone that you can talk to." "I always hope that we've been able to talk and that . . . you wouldn't need a third party in

order to take care of any of your needs." Williams replied, "Yeah we've always been tight. I've got no problems there."

Korenvaes further testified he recalled saying to Williams, "You know, I've always been here for you and the folks here and that if there's a need or something that needed to get done, you know, that I feel that's my job and what I should do, and that we didn't need an outside party to take care of these needs." He testified he did not recall saying that if the company got a second chance, he would make things right.

The testimony of both Williams and Korenvaes are relatively similar. To the extent they are dissimilar, I credit Williams version over that of Korenvaes particularly with respect to the request that the employees give the Company a second chance as testified to by Williams. I find that Konenvaes was clearly soliciting grievances with the promise to remedy them in order to induce the employees to abandon their support for the Union and that Respondent violated Section 8(a)(1) of the Act thereby. *Laboratory Corp. of America Holdings*, 333 NLRB 284 (2001).

12. Alleged interrogation by Manager Susan Hebert concerning union membership, activities, and sympathies

Employee Maverick Valdez testified he was involved in the Union campaign. He stood by the side of the road passing out fliers almost every day and attended all the meetings. About 2 weeks before the election, Suzanne Hebert, the manager of the visuals production warehouse and sign shop, approached him right outside his workstation and asked him what the knew about the Union and how he felt about it. He told her he was not for or against the Union. She then told him that the Union could offer a dollar more per hour but it could be over a period of 3 years. He told her that at this point in the campaign, the employees have their minds made up as to how they will vote.

Susanne Hebert testified she knows who Maverick Valdez is and would greet him and wave to him as she walked through the shuttle area where he worked. She denied however, that she ever had a conversation with him beyond this and testified that she did not ask him what he knew about the Union. She never asked him how he felt about the Union or discussed the Union with him at all. She never talked to him about how the Union could offer him money over a 3-year period. He never told her he was not for or against the Union.

I credit Valdez who remains employed by Respondent and whose testimony is adverse to Respondent's position in this case. I found his testimony to be specific and credible. I find that Susanne Hebert did question Valdez and make the remarks attributed to her as set out in Valdez' testimony. I find that Respondent violated Section 8(a)(1) of the Act by Hebert's interrogation of Valdez concerning his union membership, activities, and sympathies.

13. Alleged unlawful withholding of wage increases from the Tampa employees

The unit employees received an annual wage increase in April of 2000. On April 4 Vice President Mike Korenvaes sent an e-mail to Human Resources Manager Sallye Davis and Operations Vice President Carol Rylander directing them to check whether there would be any need to make wage adjustments for dock employees. He sent a follow up e-mail to Davis and Rylander on July 27. Davis reviewed the advertisements of other employers in the area and concluded that Respondent's wages for its employees were $1 below the average wages for comparable work. She also noted that a new Home Depot was scheduled to open in the immediate area.

On July 27, she recommended a $.50 per hour wage increase for the seasonal employees with upgrades among the other employees' wages. On August 7 Davis completed a cost analysis of her recommended wage increase and a week later Davis recommended it to vice president of human resources, Beth Stapleton. Davis began hearing rumors of union activities in the second week of August. According to Davis she was informed in September in a human resources conference call that the Stone Mountain, Mission Road, and Miami facilities were granted wage increases. She was told by Mike Korenvaes that Beth Stapleton had informed him the recommended raise had not been approved because they had not had difficulty hiring and did not have open jobs.

Davis testified that after the election (Oct. 6) the Company was unable to recruit the number of employees needed. The Company went to a temporary employee service to fill these needs about the first or second week of November and used approximately 10 temporary employees. In addition to the temporary employees Respondent hired approximately 60 seasonal workers because of turnover although they had only projected an initial buildup of 45 employees. During this cycle of hiring they had difficulty hiring because of the need for equity adjustments. She testified they just did not have the people walking in the doors. This problem occurred leading into the first week in November. She testified that these are the Company's heaviest weeks in preparation for the Christmas season. Usually work starts picking up in October. In April of 2001, there was both an annual wage increase and a wage equity adjustment was given to the Tampa employees, which is the type of increase that certain other facilities such as Stone Mountain, Miami, and Mission Road had received on October 2, 2000. Davis testified that Stone Mountain, Miami, and Mission Road did not receive a wage equity adjustment in April 2001 to the best of her knowledge.

Kevin Hart, senior vice president of human resources, testified that Respondent does the distribution, receipt and returns for all of the six retail divisions of the Company. The Company operates out of 14 locations, 6 of which are represented by a labor organization and 8 of which are not represented by a labor organization. The Company gives merit increases every April 1st in all the nonunion facilities. The union facilities are covered by contracts. In addition the Company has given increases or made adjustments in addition to the annual April 1st increases as a result of competitive pressures for employees that dictate a review of the rates of pay. In the year 2000, the company made adjustments (increased wages) for three facilities, the Stone Mountain, Miami, and Mission Road facilities but did not do so for the other five nonunion facilities. There were a significant number of open jobs in those facilities or technical positions that were open in the three facilities that received the adjustment and the Company was not attracting candidates to fill those jobs. Hart testified the company considered granting increases at the other five nonunion facilities but did not do so.

With respect to the other five nonunion facilities the Company reviewed the "electronic open job report" for them as well as the three facilities that received the increases. Hart explained that the electronic open job report is "real-time" and shows the number of positions that are open and the length of time that they have been open. Hart testified that the real-time numbers for the three facilities granted the increase showed that the company would not be able to process the amount of work necessary to meet the Christmas season needs and that the Company was not attracting employees to fill those jobs. Hart testified that this information showed with respect to the other five facilities that he did not have a problem. He did not grant the increase for the Tampa facility because there "weren't the business pressures, plus, I had a conversation with Joe Vella who said unless there are business reasons for the increase, he recommended strongly that we not do an increase in the middle of the activity that was taking place there." There had been some discussion about a wage adjustment at the Tampa facility prior to September but it was concluded, there was no practical reason to adjust the rates of pay. General Counsel notes in brief that the electronic open job records on which Hart purportedly relied were not produced at the hearing and entered into evidence by Respondent.

On cross-examination Hart acknowledged that in mid-spring, he had received a recommendation for an increase from Human Resource Manager Davis. He does not recall what the recommendation was or whether she ever made that recommendation to him again. Davis indicated that there was a competitiveness issue. Of the five facilities that did not receive the increase in September, the Cheshire and Tampa facilities eventually received an increase. He decided to give Tampa an increase in 2001 because by the spring of 2001, Tampa had open jobs and was not attracting candidates. In the spring of 2001, there were layoffs of employees at the same time wages were being increased to attract new employees. Over the last few years the Company has increasingly needed more employees to unload trailers and fewer employees to do clerical or processing work. The Company offered the longer-term service clerical and processing employees the opportunity to move into the trailer unloading jobs but they did not want to do this. Consequently increases were given for employees performing the trailer unloading work while at the same time it was necessary to reduce staff who did not want to do that work. However there were clericals who received raises although there was a need to reduce the clerical staff.

Carol Rylander, the operations vice-president of logistics at the Tampa facility, testified that she attended a managers' meeting conducted by Mike Korenvaes and Joe Vella. They explained that the reason for the wage increase at other locations was that the Company was getting ready to hire for the fall season and depending on the market conditions throughout the country, some facilities were able to hire and some were not. They had to look at what the competition was doing in order to be competitive with the wages offered in the various markets. She testified that a similar wage increase was not given in Tampa because there was no issue with hiring. There were "applicants coming in, as well as, *we were in a freeze. We were under a petition. There wasn't anything that could be done even if we were having problems*" (emphasis added).

I find the withholding of the wage increase from the Tampa employees violated Section 8(a)(3) and (1) of the Act. Withholding a wage increase in order to influence an election is unlawful. *Aluminum Casting & Engineering Co.*, 328 NLRB 8 (1999). The decision to grant or not to grant a wage increase during a union organizing campaign must be made as if there were no campaign, *Noah's Bay Area Bagels*, supra. If the wage increase would have been made in the absence of a campaign, it must be granted and the failure to grant the wage increase and advising employees that the increases are being withheld because of the union campaign is violative of the Act.

In the instant case I find that the Respondent would have granted the wage increase as necessary to attract candidates for its jobs in the absence of the Union's campaign. The unexplained failure of Respondent to produce the records of its electronic open job reports on which Hart testified he relied, supports an inference that these records would not support his testimony in this regard. Davis' testimony that she had informed management that the pay rates of Respondent were not competitive and her testimony that she encountered problems in hiring sufficient employees in November 2000 shows a definite business need for the pay rate increase at the Tampa facility. Moreover the testimony of Hart, Vella, and Rylander as well supports a finding that the reason for withholding the wage increase was the advent of the union campaign rather than business justifications. I recognize the contentions of Respondent that the advent of the Union's campaign placed it in a difficult situation regardless of whether it granted the raise which could be viewed as an attempt to encourage the employees to abandon their support for the Union or failed to grant the raise which has given rise to the allegation in this case. However a review of all the circumstances in this case shows that Respondent not only withheld the raise but took great pains to show the employees the raise that had been granted at the Stone Mountain facility. There was clearly no need to do this other than to demonstrate to the employees what their support of the Union had brought them. There were no assurances given to the employees that a wage increase would be given to the employees after the election. Moreover, it is significant that the employees did not receive the wage increase until 2001, well after the Respondent encountered difficulty in hiring employees in November 2000. I accordingly find that Respondent violated Sections 8(a)(3) and (1) of the Act by the withholding of the wage adjustment from the Tampa facility in the fall of 2000.

14. Alleged threats of freezing of wages because employees engaged in union activities

The record reflects that Respondent informed the employees in early October, prior to the election scheduled for October 6, that there would be no wage increases because of the upcoming election. To this end the Respondent distributed or showed an announcement of an upcoming raise at another of Respondent's facilities in Stone Mountain, Georgia, and told the employees that Respondent could not give the employees a wage increase because of the upcoming election. A wage increase to meet hiring goals at the Tampa facility had been considered and

rejected by management as discussed previously in this decision.

Respondent distributed a flyer entitled "question of the Day" to employees on or about October 3. It is as follows:

> QUESTION OF THE DAY
> October 3, 2000
>
> "MORE MONEY AND BETTER BENEFITS ARE IMPORTANT ISSUES HERE, SO WHY DOESN'T THE COMPANY JUST GIVE US A RAISE AND IMPROVE BENEFITS—RIGHT NOW?"
>
> That might be a good idea, but, unfortunately, it is illegal. The law does not give us the right to influence Friday's vote by changing wages or benefits now, even if we wanted to.
>
> Right now, wages and benefits are "frozen" until the election is decided. If the union is rejected by a majority of associates voting in the election, the "freeze" on changes would be lifted, once the Labor Board certifies the results of the vote.
>
> However, if the union wins your vote, then wages and benefits become subject to "give and take" bargaining and remain "frozen" until a contract gets negotiated, or the union calls a strike. During this time, the only changes the company can make without union bargaining are "routine" past practice changes such as normal merit reviews.
>
> The election choice you make is very important. Please consider it carefully.
>
> /s/ Mike Korenvaes
> Mike Korenvaes
> Vice President

This announcement set out the facts with respect to a wage increase. It is not alleged as a violation of the Act in the complaint.

However, additionally, Respondent distributed or showed to employees an announcement dated October 2, 2000, of a wage increase at Respondent's Stone Mountain, Georgia facility. Employee Mike Mitchell testified that Manager Art Houle distributed this announcement to employees at a group meeting of employees. He testified also that Houle told the employees that they would have received the increase if there were no union campaign at the Tampa facility. Employee David Shannon testified that Houle handed him a copy of the Stone Mountain announcement and told him that there were things going on in the background but there was a freeze because of the Union. Rebecca Harvey testified that Houle handed the Stone Mountain announcement to her while she was talking to manager Jody Beachy and that Beachy told Houle, he should show it to employees but not give it to them. Shannon also testified that Vice-President Carol Rylander approached him on October 4, and showed him the Stone Mountain wage increase announcement. She told him a 50 cents raise would add up to a $1000 raise per year and a $1 raise would be $2000 annually. She also testified he should think about his vote. Emanuel Williams testified that around October 4, Manager Calvin Warren approached him, told him he was doing a good job and then told him that the Stone Mountain employees were being given raises. Williams asked why Tampa employees were not receiving raises and Warren told him they could not receive raises because of a freeze as the result of the Union campaign.

Houle denied discussing wages or the Union at a group meeting. He acknowledged talking to Harvey and Mitchell and possibly Shannon about wages and that he told employees that there was a freeze on wages at the Tampa facility. Rylander admitted that she had a discussion with Shannon concerning a wage increase but testified this was initiated by Shannon. Manager Jody Beachy admitted he told Gay and other employees that wages would remain the same regardless of the time the bargaining process took and admitted he did not tell employees that they would receive regularly scheduled merit increases.

I credit the foregoing testimony of the employees that Respondent's managers showed or gave them copies of the Stone Mountain wage increase announcement and told them they would not receive a raise because of a freeze on wages as a result of the union campaign. Respondent orchestrated the showing of the Stone Mountain wage increase and the placement of blame on the Union for Respondent's failure to grant the employees a raise as part of its campaign to defeat the Union in the upcoming election. This contention is inconsistent with Respondent's defense that it lawfully withheld the raise because there was no business reason for granting the raise.

An employer may not "attribute to a union the onus for the postponement of adjustments in wages and benefits" and may not "create the impression that it stood in the way of their getting planned wage increases and benefits." *Grouse Mountain Lodge*, 333 NLRB 1322 (2001), quoting *Atlantic Forest Products*, 282 NLRB 855, 858 (1987), quoting in part *Uarco*, 169 NLRB 1153, 1154 (1969). An employer may not inform employees it is withholding benefits because of a pending election in the absence of an explanation that the benefit will be granted after the election regardless of the outcome of the election. *Noah's Bay Area Bagels, LLC*, 331 NLRB 188 (2000). I accordingly find that Respondent violated Section 8(a)(1) of the Act by its threats to freeze wages because of the engagement of its employees in union activities and by the placement of blame on the Union for the wage freeze.

15. The discipline of employees Emanuel Williams and Sandra Lewis

FACTS

Emanuel Williams and Sandra Lewis were two of the leading supporters of the Union during the election campaign and were suspected by management of being union supporters who were soliciting support of the employees in the unit by attempting to obtain the names, addresses, and telephone numbers from the employees. Both Williams and Lewis are African Americans. There were a number of Haitian employees in the bargaining unit who spoke Creole. Williams and Lewis, sought to have Haitian employee, Yves Saintelmy, assist in the campaign by informing the Haitian employees of the Union's message. Saintelmy was reluctant to do so. In early August, Williams commenced to tease Saintelmy that he was afraid to support the Union and flapped his arms and made noises like a chicken. Sandra Lewis who was a lead employee responsible for Wil-

liams and Saintelmy smiled and did not dissuade Williams from his antics, she noted Saintelmy and other employees in the group started laughing. Later on Williams was assisting in unloading a truck that Saintelmy was to unload. When Saintelmy approached, Williams said let that m—f—ker unload it and shoved a pallet towards Saintelmy. Lewis reported to her manager, Gary Adams, that Saintelmy was causing problems and incidentally that Williams had shoved a pallet at Saintelmy and called him a m—f—ker. Adams called Williams, Saintelmy, and Lewis into his office and told Williams his conduct had been improper and that he should apologize. Williams said, "sorry" and left. Saintelmy was dissatisfied with this and went to see Human Resources Manager Sallye Davis to complain about the conduct of Williams and Lewis. She typed up his statement which described the incident and which related that, "Williams and Lewis were soliciting employees on behalf of the Union and that they were attempting to get him to assist by talking to the Haitian employees."

On August 14 Davis wrote a memo concerning her meeting with Lewis on that date as follows:

> *Get w/ Sandra
> Point finger @ you
> Totally involved
>
> Sandra denied soliciting
> She said that people had told her that her name was being passed around but it was not true
> She went on to say that she was not asking people to sign anything for a union
> I remind Sandra of the No Sol. Policy
> She said that she was aware of the policy and would never solicit anyone.
> On August 17, 2000, Davis wrote a memo of her meeting with Emanuel Williams:
> Called Emanuel Wms to HR to speak w/ him about NO SOLIC POLICY as he has been identified as someone approaching associates and asking them for their address & phone number for what has been reported as a petition.
> Emanuel denies soliciting anyone and challenged me to bring his accusers to HR so that he could confront them. I told Emanuel that no one was going to be called up and that this was a verbal conversation to insure that he was aware of the policy and that if he was not soliciting then there would be no further issues but if he was then the policy would be applied to him as he had now been put on verbal warning.
> He said fine and left.

On August 24 Davis typed up a statement from Yves Saintelmy of a complaint about his treatment by Sandra Lewis and Emanuel Williams. The complaint states as follows:

> I, Yves Saintelmy want to file a formal complaint about the wrong treatment shown to me by my supervisor Sandra Lewis. Sandra talks to me like I am an animal. I feel this treatment has gotten worse since I refused to help her and Emanuel Williams convince my Haitian coworkers to sign up for the union.
>
> During the week of August 7th, I was approached by Emanuel Williams and asked to speak with my Haitian coworkers about signing up for the union. I told Emanuel that I was not going to ask people to sign up for the union and that if he wanted to ask people to sign up, he would have to do it himself. Emanuel had a piece of paper in his hand that had a lot of names on it. He then asked me to give him my name, address and phone number. I told him I did not have a name or a phone number and he left.
>
> During that week people were talking that Calvin Warren was standing around watching people to make sure they weren't talking about the union. Because of Calvin watching, Emanuel and Sandra were not talking to people about the union like they had been. Sandra and Emanuel have been talking to people in shuttle about the union for about 2 months.
>
> On Friday, August 18th, I was approached by Emanuel Williams and Sandra Lewis and Emanuel said to me that I was scared to sign the paper for the Union. Emanuel then told me that I fly just like a chicken and he then started to flap his arms and make chicken sounds. Sandra laughed at what Emanuel was saying to me.
>
> On Wednesday, August 23rd, I was working on my trailer when Emanuel brought a pallet for my trailer. Sandra was with Emanuel when he came with the pallet. I move a box out of the way so that the pallet could be put on the trailer. Emanuel then turned to Sandra and said 'Why did that m—f—ker touch that box for, I don't need his help'. I asked Emanuel why did he cuss me and he said to me 'What do you want'. I said to Sandra that he can't talk to me that way and she told me to go find Gary. I told her she was my supervisor and that she was suppose to tell Gary. She then told me I can just go to Personnel and I told her that Personnel was closed. Emanuel then pushed the pallet jack towards me and they both walked away. About 15 minutes later, Gary called me to his office along with Sandra and Emanuel. I told Gary what happened and Emanuel said the he was not cussing me he was cussing the trailer. Sandra also told Emanuel that he knew he was not supposed to cuss at people in the building. Emanuel was talking about me. Gary told Emanuel that he knew he was not supposed to cuss at people in the building. Emanuel got up and tried to leave the office and Gary stopped him and told him he was not finished yet. Gary told Emanuel that he wanted to make sure again that he understands that he's not supposed to cuss people and Emanuel said okay, sorry. He never apologize to me.
>
> This week I have been harassed everyday by Sandra or Emanuel. I have been called into Gary Adams' office twice on Monday, once on Wednesday and then again this morning. I feel that this is not fair and that I'm being treated this way because I won't help them with the union.
>
> */s/ Yves Saintelmy—8 24 2000*
> Yves Saintelmy

On August 24, 2000, Davis typed a statement from Jean Oreus, a Haitian worker, complaining about an ethnic slur having been made against him by Sandra Lewis who he testified at

the hearing referred to him as "across the water people." Davis who is black testified that referring to someone as "across the water" is a derogatory reference in the African American community which is directed against blacks who have come to America from the islands and is not restricted to the Haitian people. Lewis testified that she did not direct this comment to Oreus. She testified that she was in the area where Oreus worked looking for employee Janet Williams who had left a message with another employee for Lewis as she had a question about the Union. Lewis testified she was on break when she went to see Janet Williams. She did not find Janet Williams and asked employee Jean Oreus who is a Haitian if he knew where she was and that Oreus replied, "Give me a dollar." She then asked him why the Haitian people always asked for a dollar whenever they are asked to do anything as she had heard this response from other Haitians in the past. Oreus testified that he joked with Lewis by telling her he would show her where Williams was for 25 cents. In his statement given to Davis, Oreus stated that Lewis then said to him, "Why all you cross the water people think people have to give you money to get you to do anything.!" (sic). Oreus took offense at this and attempted to explain to her that although he was from Haiti, his family had come from Africa also. Lewis walked away to Janet Williams who was coming out of the delivery department at that time.

The statement typed by Davis for Oreus dated 8–24–/00 is as follows:

> I am giving this statement to report a comment from a supervisor[2] that I feel was wrong and to report that the same supervisor came to my department to speak with a coworker about unions during work hours.
>
> On Tuesday, August 22nd, I was in my area working when I was approached by a woman who I knew was a supervisor in Shuttle but at that time I did not know her name. She asked me if I could show her where to find Janet. I joked with her by saying that I would show her for 25 cents. She then said to me 'Why all you cross the water people think people have to give you money to get you to do anything!' I took offense to this comment and said to her that although I am from Haiti that my family came from Africa and that if she knew anything about her ancestry, her great grandparents had come from across the water too. She then told me that she didn't want to hear anything else I had to say and turned to walk away. Janet was coming out of the Delivery office and I saw her walk over to Janet.
>
> I went back to work and Janet came over to me and told me that Sandra, that's when I found out her name, had told her that a union was being started in the building and that the union was going to get us more money and better benefits. I asked Janet if Sandra was a supervisor like I thought and she said yes. I told Janet that Sandra had no right as a supervisor to be talking to workers about unions. Janet said that she had worked here for 10 years and only made $8.55 and that if the union could get her more money she was all for it because she didn't feel she made enough
>
> I was approached by my supervisor and told that Sallye Davis from Human Resources had asked if I could interpret in Creole at a meeting the next day at 11 am by phone. I was asked if I could come in early and I said I would.
>
> During this meeting I interpreted, unions came up and people were told that no one should approach them during their work hours about signing forms for unions and giving their address and phone numbers. Because of hearing this, I called Sallye Davis in Human Resources and told her about Sandra coming into our department.

Davis also met with Lewis on 8/24/00. Her memo of that date is as follows:

> Met w/ Sandra Lewis to discuss 2 issues
> 1. Inappropriate comment to an associate
> 2. Soliciting during work hours
> (refer to signed statements)
> Saintelmy & Oreus
>
> /.Sandra admits that she was back in delivery looking for Janet Williams because someone had told her Janet wanted to see her. She admitted to approaching Jean Oreus to ask for directions to Janet's office. She states that she said 'Why do all you people from Haiti think people are suppose to give you money to get you to do anything". Denied making the statement 'Cross the water people'
>
> Admitted to going to see Janet to discuss union. States that Janet made the request through a person she refused to name.
>
> Admitted to witnessing the incident involving Emanuel Williams referring to Yves Saintelmy as a chicken for not supporting the union. States that she did laugh because she thought it was a joke.
>
> Admitted to hearing Emanuel Williams call Yves Saintelmy a m—f—ker and stated that she passed this info on to Gary Adams. Admits that Emanuel pushed the pallet of merchandise towards Yves.

On August 24, Davis suspended Lewis and Emanuel Williams pending an investigation with the intent to discharge them. However, a petition for the election was filed on August 25, and then vice president of human resources, Joe Vella, a seasoned management representative who now serves as a consultant to Respondent, testified he advised against such action and the Respondent gave Emanuel Williams a final warning when he reported on September 1, as directed by Davis in a phone call. He was paid for the time off and put back to work. Davis also attempted to meet with Lewis who was not available until September 5 to come to the office for a meeting where she was given a final warning and was demoted from her lead position to a position in another department. She was also paid for the time she was off work up until September 1, when she was to initially come in. Lewis asked for time to think whether she would accept the demotion and had not accepted the demotion as of the date of the hearing.

[2] Lewis was actually a lead employee and in the unit.

With respect to the demotion of Lewis, Davis testified that there had been approximately five complaints against Lewis by employees who Lewis was in charge of in her lead position. The complaints were related to complaints about her tone of voice and how she related to the other employees. There was no prior disciplinary action against her but there were comments by Manager Calvin Warren that she needed to work on this. Davis testified that the demotion of Lewis was based on her ethnic slur to Oreus and her treatment of the incidents between Saintelmy and Williams. Davis' notes of her meeting with Lewis on August 24, 2000, however state that Lewis' engagement in solicitation was one of the reasons for the final warning and demotion. Additionally Lewis testified that Davis informed her the actions were taken against her for soliciting. Emanuel Williams testified that Davis cited his engagement in solicitation as the reason for the issuance of the final warning in his initial suspension but that she made no reference to the Saintelmy incident until he reported to work on September 1 and was given a written final warning. I credit Lewis' and Williams' testimony that their initial suspension on August 24 was attributed to their engagement in solicitation on behalf of the Union.

Analysis

Several factors are considered by the Board in analyzing discrimination cases under Section 8(a)(3) and (1) of the Act in accordance with *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The General Counsel must establish that the employer had animus against the Union, had knowledge that the alleged discriminatee was a union supporter and/or of the alleged discriminatee's union activities and that the employer took an adverse job action against the employee, which was motivated at least in part by its antiunion animus. In making this determination the timing of the adverse job action in relation to the animus and knowledge of the employees' union membership, union activities and sentiments is to be considered to determine whether there is a nexus between the adverse job action and the employees' union affiliation. *Masland Industries*, 311 NLRB 184 (1993).

In the instant case it is clear that the Respondent had animus against the Union and its supporters as established by the 8(a)(1) violations, the antiunion campaign and the record as a whole. Davis had knowledge of their support of the Union and engagement in union activities and warned Emanuel Williams and Lewis against solicitation of their fellow employees on behalf of the Union under threat of termination. The complaints of Saintelmy and Oreus further informed Davis that Lewis and Williams were continuing to engage in solicitation of their fellow employees on behalf of the Union. Thus, the nexus between Respondent's antiunion animus and the issuance of the final warnings and the demotion has been established. *Masland Industries*, supra.

Once the General Counsel has established a prima facie case that the protected conduct was a motivating factor in an employer's action against the employee, the burden shifts under *Wright Line*, to the Employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. This burden is not carried by merely showing that it also had a legitimate reason for taking the adverse action. Rather it must "persuade" that the action would have taken place in the absence of the protected conduct "by a preponderance of the evidence." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). If the employer fails to carry its burden of persuasion, a violation will be found. *Bronco Wine Co.*, 256 NLRB 53 (1981).

I find the Respondent has failed to carry its burden of persuasion in this case. It is clear that the solicitation engaged in by these employees was the real reason for the actions taken against them and that the matters involving Saintelmy and Oreus were an afterthought designed to cover the real reason for the discipline particularly since Respondent initially took no action against Lewis and Williams until Davis learned that Lewis and Williams were continuing to engage in solicitation. I thus, find, that the General Counsel has established prima facie cases of violations of Section 8(a)(3) and (1) of the Act by the discipline of these employees and that Respondent has failed to rebut them by the preponderance of the evidence. *Wright Line*; *Sea Ray Boats, Inc.*, 336 NLRB 779 (2001).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct.

(a) Maintaining an unlawful no-solicitation/distribution rule in its employee handbook and by disparately enforcing the rule against union supporters.

(b) Interrogating employees concerning their union activities and those of their fellow employees.

(c) Creating the impression among its employees that their union activities were under surveillance.

(d) Soliciting an employee to attend a union meeting and report back what occurred at the meeting.

(e) Soliciting grievances with the promise to remedy them in order to encourage employees to abandon their support for the Union.

(f) Promising unspecified benefits to an employee if the employees abandoned their support of the Union.

(g) Threatening its employees with the futility of their support of the Union.

(h) Threatening employees with the loss of their pension plan, 401(k) plan, and other benefits if they select the Union as their collective-bargaining representative.

(i) Threatening employees that bargaining would start from zero, that the Union would strike, that the work would be moved, and the employees would be replaced in the event of the strike.

(j) Threatening employees with a freeze of their wages because of their engagement in union activities.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by

(a) Withholding a wage increase because of the union campaign and the employees' engagement in union activities.

(b) Issuing a final warning to its employees Emanuel Williams and Sandra Lewis and demoting Sandra Lewis because of their engagement in union activities.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Objections to the Election

On October 13, 2000, the Union filed timely objections to the election held on October 6, 2000, which had resulted in:

Approximate number of eligible voters	158
Void ballots	1
Votes cast for Petitioner	60
Votes cast against participating labor organization	81
Valid votes counted	141
Challenged ballots	1
The challenged ballot is not sufficient in number to affect the results of the election.	

A majority of the valid votes counted plus challenged ballots has not been cast for the Union. The Regional Director of Region 12 of the National Labor Relations Board issued her Order directing hearing on objections and consolidating cases for hearing on June 5, 2001.

My recommended findings are as follows:

Fifteen objections were filed by the Union. Objection 1 and a portion of Objection 12 were withdrawn.

Objection 2—The employer told employees that it would be paying higher wages, but for the Union. *Objection 10.* The employer withheld from employees' improvements in wages, hours, and working conditions because of the Union.

In view of my finding that the Employer violated the Act by failing to grant a wage increase and by placing the onus on the Union for doing so, Objections 2 and 10 are sustained.

Objection 3—The employer engaged in and/or created the appearance of surveillance of its employees' union activities and sympathies in an effort to intimidate and coerce its workers.

I find that this objection should be sustained in part in view of my findings that Manager Calvin Warren created the appearance of surveillance in violation of the Act.

Objection 4—The employer unlawfully threatened to close its facility because of the Union. *Objection 7*—The employer threatened its employees by telling them that the selection of the Union as their bargaining representative would be futile and that the employer would intentionally prolong and delay bargaining and cut their wages and benefits if they selected the Union as their representative. *Objection 9*—The employer threatened its employees by telling them that it intended to bargain from scratch and/or to unlawfully create an impasse in bargaining if they selected the Union as their bargaining representative.

I find these objections should be sustained in view of my finding that at the October 2, 2000, meeting conducted by vice presidents, Vella and Hart, they told the employees that if negotiations were to last for any period of time, the Employer could shut the building down and move the work elsewhere as in the case of the Employer's hurricane contingency plan and also told them that they would negotiate from zero, that any existing benefits could be in jeopardy and that in negotiations the employees would begin with no benefits.

Objection 5—The Employer, contrary to past practice, denied union supporters privileges granted to other employees and discriminated in the enforcement of its work rules.

I find this objection should be sustained as I find the maintenance of the invalid no-solicitation rule and the disparate enforcement of that rule by prohibiting solicitation on behalf of the Union while permitting other solicitations during working time as found in this decision supports this objection.

Objection 6—The employer threatened its employees with loss of wages, jobs, and benefits if they selected the Union as their representative.

I find this objection should be sustained in view of my crediting of the testimony of employee Mike Mitchell that during the last week of August, Manager Art Houle told employees that if the Union were successful it could take the pension plan and the 401(k) away from the employees.

I also credited the testimony of Kathy Lee Gay that in mid-September Manager Jody Beachy told her that the Employer would not increase wages during negotiations in mid-September and that the employees would lose their 401(k) if the Union won the election.

Objection 8—The employer coercively interrogated its employees concerning their union sympathies and activities and the union sympathies and activities of their coworkers.

I find this objection should be sustained in view of my findings that in early September Manager Calvin Warren interrogated employee Emanuel Williams, that in late September or early October, Manager Jody Beachy interrogated Rebecca Harvey, that 2 weeks before the election, Visuals Manager Suzanne Hebert interrogated Maverick Valdez, that in mid-September, Manager Jody Beachy interrogated Kathy Lee Gay, and that on election day Manager Calvin Warren interrogated Maverick Valdez.

Objection 11—The employer unlawfully solicited, remedied and/or promised to remedy employee grievances in order to discourage its employees from voting for and supporting the union.

I find that this objection should be sustained in part in view of my findings that various members of the Employer's management solicited grievances from employees with the implied promise to remedy them in order to encourage its employees to abandon their support for the Union.

Objection 12—The employer discriminatorily disciplined and discharged union supporters in order to affect the results of the election and to intimidate and coerce the electorate.

I find this objection should be sustained in part as a result of my findings that the Employer unlawfully discriminated against employees Emanuel Williams and Sandra Lewis by the issuance of final warnings to them and the demotion of Sandra Lewis because of their engagement in concerted activities on behalf of the Union.

Objections 13 and 14 were withdrawn by the Union and Objection 15 is a catchall objection for which there is no additional evidence of objectionable conduct.

I thus conclude that Objections 2, 10, 3, 4, 7, 9, 5, 6, 8, 11 and 12 should be sustained as the underlying objectionable conduct was pervasive and occurred during the critical period prior to the election and rendered the holding of a fair election impossible. The results of the election of October 6, 2000, should be set aside and Case 12–RC–8539 should be remanded to the Regional Director of Region 12 of the National Labor Relations Board and a new election should be set at a time and place to be determined by the Regional Director consistent with the recommended Remedy.

REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes of the Act including the posting of the Board notice attached to the decision (Appendix).

I shall recommend that Respondent be ordered to rescind the unlawful final warnings issued to Emanuel Williams and Sandra Lewis and the unlawful demotion of Sandra Lewis and restore Sandra Lewis to her former position or to a substantially equivalent position if her former position no longer exists and make her whole for any loss of earnings and benefits she may have suffered by reason of Respondent's unlawful demotion of her.

I shall recommend that Respondent make its employees whole for any loss of earnings and benefits they may have sustained as a result of the unlawful withholding of a wage increase in October 2000.

All loss of earnings and benefits shall be computed as provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed under *New Horizons for the Retarded*, 283 NLRB 1173 (1987), at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. Section 6621.

It is further recommended that Respondent be ordered to remove from its records all references to the foregoing discipline of Emanuel Williams and the discipline and demotion of Sandra Lewis, and to notify each of the employees that this has been done and that evidence of such discipline and demotion will not be used as a basis for further discipline or demotion.

I find the Respondent's numerous unfair labor practices warrant a broad cease and desist order. In view of the employment of a number of Haitian employees who do not understand or speak English, I recommend that the notice be posted in both English and Haitian Creole. I also recommend there be a public reading of the notice by a responsible management official or by a Board agent in the presence of a management official. It is further recommended that Respondent supply the names and addresses of employees, updated every 6 months, to the Union for 2 years or until a certification after fair election, that the election be held at a site off the Employer's premises, that Respondent provide reasonable access for the union to nonwork areas for 2 years or until a certification after a fair election, that the Union be provided with notice of and equal time for captive audience speeches for 2 years or until a certification after a fair election. I do not recommend reimbursement of the Union's organizing expenses, *Blockbuster Pavilion*, 331 NLRB 1274 (2000); *Fieldcrest Cannon, Inc.*, 318 NLRB 470 (1995).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent Federated Logistics and Operations, a Division of Federated Corporate Services, Inc., Tampa, Florida, shall

1. Cease and desist from

(a) Maintaining an unlawful no-solicitation/distribution rule and disparately enforcing the rule against union supporters.

(b) Interrogating its employees concerning their union membership, activities, and sympathies and those of their fellow employees.

(c) Informing its employees that it would be futile to select the Union as their collective bargaining representative.

(d) Creating the impression among its employees that their union activities are under surveillance.

(e) Soliciting an employee to attend a union meeting and report back what occurred at the meeting.

(f) Soliciting grievances with the promise to remedy them in order to encourage employees to abandon their support for the Union.

(g) Promising unspecified benefits to employees if the employees abandon their support for the Union.

(h) Threatening employees with the loss of their pension plan, 401(k) plan, and other benefits if they select the Union as their collective-bargaining representative.

(i) Threatening employees that bargaining would start from zero, that the Union would strike, that the work would be moved, and the employees would be replaced in the event of a strike.

(j) Threatening employees with a freeze of their wages because of their engagement in union activities.

(k) Withholding a wage increase because of the union campaign and the employees' engagement in union activities.

(l) Issuing final warnings to its employees and demoting its employees because of their engagement in union activities.

(m) Violating the Act in any other manner.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order rescind the final warnings issued to Emanuel Williams and Sandra Lewis and the demotion of Sandra Lewis and make them whole for any loss of earnings and benefits they may have sustained as a result of the unlawful discipline with interest. Offer Sandra Lewis a return to her former position without prejudice to her length of service, seniority, or other rights and privileges previously enjoyed.

(b) Within 14 days from the date of the Board's order, remove from the personnel file of the above named employees any reference to the unlawful discrimination against them and,

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

within 3 days thereafter notify them in writing that this has been done and that it will not be used against them in any way.

(c) Within 14 days from the date of the Board's order make whole each of the unit employees for any loss of earnings and benefits sustained by them as a result of the unlawful withholding of the wage increase in October 2000, with interest.

(d) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix.[4]" Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The notice shall be posted in both English and Haitian Creole and shall be read in the presence of all unit employees by a responsible management official or by a Board agent in the presence of a management official and shall also be read in Haitian Creole by an interpreter. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 2000.

(e) Respondent shall supply the names and addresses of employees, updated every 6 months, to the Union for 2 years or until a certification after fair election. The election shall be held at a site off the Employer's premises. Respondent shall provide reasonable access for the union to nonwork areas for 2 years or until a certification after a fair election. The Union shall be provided with notice of and equal time for captive audience speeches for 2 years or until a certification after a fair election.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

It is further recommended that Case 12–RC–8539, shall be severed and remanded to the Regional Director for the setting of another election in accordance with the recommended Remedy.

Dated, Washington, D.C. March 14, 2002

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and disparately enforce an unlawful no-solicitation/distribution rule.

WE WILL NOT interrogate employees concerning their union activities and membership in Union of Needletrades, Industrial and Textile Employees (UNITE!) and those of their fellow employees.

WE WILL NOT create the impression among our employees that their union activities are under surveillance.

WE WILL NOT solicit employees to attend union meetings and report back what has occurred at the meetings.

WE WILL NOT solicit grievances with the promise to remedy them in order to encourage employees to abandon their support for the Union.

WE WILL NOT promise unspecified benefits to our employees if they abandon their support of the Union.

WE WILL NOT threaten our employees with the futility of their support of the Union.

WE WILL NOT threaten our employees with the loss of their pension plan, 401(k) plan, and other benefits if they select the Union as their collective bargaining representative.

WE WILL NOT threaten our employees that bargaining will start from zero, that the Union will strike, that their work will be moved, and the employees will be replaced in the event of a strike.

WE WILL NOT threaten our employees with a freeze of their wages and will not withhold a wage increase because of their engagement in union activities.

WE WILL, within 14 days from the date of this Order rescind the final warnings issued to employees Emanuel Williams and Sandra Lewis and the demotion of Sandra Lewis and will return Sandra Lewis to her former position or to a substantially equivalent position if her former position no longer exists, and will make these employees whole for any loss of earnings or benefits they may have sustained as a result of the unlawful discrimination against them, with interest.

WE WILL, within 14 days of the Board's order remove from the records of Emanuel Williams and Sandra Lewis any reference to the unlawful discrimination and inform them it will not be used against them in any manner in the future.

WE WILL, within 14 days of the Board's order make whole the unit employees for the wage increase that was unlawfully withheld from them in October 2000, with interest.

FEDERATED LOGISTICS AND OPERATIONS, A DIVISION OF FEDERATED CORPORATE SERVICES, INC.